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COMPETENCY OF HUSBAND TO GIVE EVIDENCE AGAINST PARAMOUR ON TRIAL FOR ADULTERY COMMITTED WITH WIFE.

In a criminal prosecution of the wife's paramour, can the husband be allowed to testify?

The common law incompetency of husband and wife was removed by the legislature of Virginia by Acts of 1893-4, p. 722, § 3346a of the Code 1904.

Sub-section 2 of this Act embodies the law applicable to the question under consideration. This sub-section provides that:

> "In criminal cases husband and wife shall be allowed and subject to the same rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled nor, without the consent of the other, allowed to testify against the other," etc.

If the evidence of the husband is not to be received it is because it would be evidence against the wife without her consent, as forbidden by the statute. Is such, evidence against the wife; and would the judgment be evidence against her in any court? It does not follow that a conviction of the paramour would aid the conviction of the wife. Would the husband have been a competent witness at common law? The prohibition of the husband or wife to testify at common law may be given as follows: "(1) One spouse may not testify for the other: (2) One spouse may not testify against the other: (3) One spouse may not testify to confidential communications by the other." First Greenleaf's Evidence (6th Ed.), § 333c.

That the rule that excludes a party to the suit from being a witness also excludes the wife or husband appears from the following statement:

> "The rule by which parties are excluded from being witnesses for themselves applies to the case of husband and wife,

neither of them being admissible as a witness in a cause, civil or criminal, in which the other was a party." Greenleaf's Evidence (6th Ed.), § 334.

At common law a party to a suit could not testify because of interest. See First Greenleaf's Evidence, § 328c.

Defendants in criminal cases are governed by the same rule.

"The principle upon which parties in civil cases were excluded was of course regarded as also excluding the defendant in a criminal case, and he was incompetent to testify in his own favor. Where there were two or more co-defendants, the rule prevented one of them from testifying for the other, until he had been discharged from the record as a party, either by a nolle prosequi, a verdict of acquittal, a plea of guilty, or other final disposition; and the same requirement was thought to prevent the prosecution from calling him against the other defendant, unless on the same conditions. The accomplice was not as such incompetent, nor yet by virtue of being interested through a promise of pardon, but only so far as by being indicted and tried with the other he became a party-defendant." First Greenleaf's Evidence (6th Ed.), § 333a.

It will be observed that at common law the competency of a party to testify depends on the fact of being a party to the suit, and if a party is permitted to testify in any case it seems that the spouse would also be permitted to testify. The husband or wife need not be a party to the record to make either incompetent, but if either has an interest directly involved in the suit, both, at common law, would be incompetent to testify. See Greenleaf's Evidence (6th Ed.), § 341.

But if the husband or wife would not be affected by the judgment entered in the suit, their evidence would be received at common law. Greenleaf's Evidence (6th Ed.), § 342, states the rule in these words:

"But though the husband and wife are not admissible as witnesses against each other, where neither is directly interested in the event of the proceeding, whether civil or criminal; yet, in collateral proceedings, not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may subject the other to a legal demand."

In Baring *v.* Reeder, 1 Hen. & M. 154, the first syllabus applies the rule as follows:

> "Suits in which the husband is not immediately and certainly interested, but may be so eventually, the wife is a competent witness."

The decision in the above case was by a divided court, all five of the judges giving separate opinions. And the decision of the court was upheld in the case of Richardson *v.* Carey, etc., 2nd Rand. 87-92.

The second syllabus in Richardson *v.* Carey, etc., contains the following:

> "A witness is competent, if the record in the suit in which he testifies, cannot be given in evidence for or against him, in any future suit to which he may be a party."

This rule has been sustained by our Supreme Court of Appeals on several occasions. See Masters *v.* Warner, 5 Gratt. 168; Clements *v.* Kyles, 13 Gratt. 477.

There are cases holding against the competency of one spouse to testify against a third party on trial for adultery committed with the other spouse; but the cases so holding are not late cases. See State *v.* Gardner, 1 Root, 485; Howard *v.* State, 94 Ga. 587, 20th S. E. 426; State *v.* Welch, 26 Me. 30, 45th Am. Dec. 94; Com. *v.* Sparks, 7 Allen, 534; State *v.* Wilson, 31 N. J. L. 77; State *v.* Jolly, 20 N. C. 108, 32 Am. Dec. 656.

On the other hand it has been held that the evidence of the husband or wife was competent against the paramour. Campbell *v.* State, 133 Ala. 158; 32 So. 635; Pruett *v.* State, 141 Ala. 69, 37 So. 343; State *v.* Bennett, 31 Iowa 24; State *v.* Vollander, 57 Minn. 225. 58 N. W. 858; State *v.* Marvin, 35 N. H. 22; State *v.* Wiseman, 130 N. C. 726, 41 S. E. 884; Heacock *v.* State, 4 Akla. Crim. Rep. 606, 112 Pac. 949; Morrill *v.* State, 5 Tex. App. 447; Alonzo *v.* State, 15 Tex. App. 378, 49 Am. Rep. 207; State *v.* Nelson, 39 Wash. 221, 81 Pac. 721; State *v.* West, 118 Wis. 469; 99 Am. St Rep. 1002, 95 N. W. 521.

It clearly appeals from the weight of authority, as well as from reason, that the husband was a competent witness against the paramour before our statute was enacted.

In the case of Smith *v.* Commonwealth, 90 Va. 759, 19 S. E. 843, the court held that on the separate trial of Smith, the wife of Commodore Sloan, who was jointly indicted for the murder of Milly Sloan, was a competent witness for the Commonwealth against Smith. The first syllabus of that case is in these words:

> "Where persons jointly indicted elect to be tried separately, the wife of one of them may testify against the other."

What the court said in the Smith case should apply to any and all cases against a third person charged with the commission of a crime jointly with one spouse, but separately tried.

It therefore appears from the foregoing that the husband should be allowed to testify on behalf of the Commonwealth against his wife's paramour on trial for adultery.

A. S. HESTER,

Lynchburg, Va.